


MARCH 14, 2022 | OSHA INSPECTIONS, CITATIONS & ENFORCEMENT

# BREAKING – OSHA Launches New COVID-19 Enforcement Blitz for Healthcare Employers

By Conn Maciel Carey LLP's [COVID-19 Task Force](#)

On Tuesday, March 8<sup>th</sup>, OSHA announced a major COVID-19 enforcement blitz in the healthcare industry that will last for the next three months. OSHA issued an enforcement [memorandum](#) announcing the enforcement program, which OSHA is referring to as a major “saturation effort,” to ensure that hospitals and others in the healthcare industry have appropriate COVID-19 mitigation protocols in place to protect workers today and are prepared for a future variant. The program will be comprised of a short-term burst of highly-focused inspections directed at hospitals and skilled nursing care facilities that treat COVID-19 patients. Below is a summary of who is covered, when the enforcement effort will end, the impact on State OSH Plans, and what to expect during the inspections. 

OSHA states that the goal of this inspection program is to expand its presence to ensure continued mitigation of the spread of COVID-19 and preparation for future variants of the SARS-CoV-2 virus, and to protect the health and safety of healthcare workers at heightened risk for contracting the virus. New Assistant Secretary of Labor for OSHA Doug Parker stated:

***“We are using available tools while we finalize a healthcare standard.... We want to be ahead of any future events in healthcare.”***

**OSHA plans to conduct as many as 1,000-1,500 inspections in the next 90 days** to determine whether hospital and other healthcare workers are being adequately protected from COVID-19 spread at work. The inspections will last 2-4 days and will focus on what had been the major elements of OSHA’s COVID-19 Emergency Temporary Standard for Healthcare. The OSHA resources designated for this enforcement blitz and the revised COVID-19 National Emphasis Program (NEP) will comprise at least 15% of OSHA’s enforcement activity for the year.

## **Who is Covered by the Enforcement Effort?**

The initiative supplements OSHA’s targeted enforcement under the Revised COVID-19 NEP [[DIR 2021-03 \(CPL 03\)](#)], by conducting focused, partial follow-up and monitoring inspections of previously inspected or investigated hospitals and skilled nursing care facilities within four North American Industry Classification System (NAICS)

codes listed in the enforcement memorandum, where COVID-19 citations or Hazard Alert Letters were issued, including remote-only inspections where COVID-19-related citations were issued. Specifically, facilities in the four NAICS codes listed below may be selected for inspections under the initiative if they meet **one** of the following criteria:

1. Follow-up inspection of any prior inspection where a COVID-19-related citation or hazard alert letter (HAL) was issued;
2. Follow-up or monitoring inspections for randomly selected closed COVID-19 unprogrammed activity (UPA), to include COVID-19 complaints and Rapid Response Investigations (RRIs); *or*
3. Monitoring inspections for randomly selected, remote-only COVID-19 inspections where COVID-19-related citations were previously issued.

The four NAICS codes include two representing hospital sectors and two for Nursing and Residential Care sectors:

1. 622110 – General Medical and Surgical Hospitals
2. 622210 – Psychiatric and Substance Abuse Hospitals
3. 623110 – Nursing Care Facilities (Skilled Nursing Facilities)
4. 623312 – Assisted Living Facilities for the Elderly

To determine who gets on the inspection list, Area Offices are instructed to generate a list of previously inspected establishments where COVID-19 citations or Hazard Alert Letters (HALs) were issued, including remote-only inspections where COVID-19-related citations were issued, and to also create a list of establishments with closed COVID-19 unprogrammed inspection activities, including complaints and rapid response investigations. The establishments on these lists will be limited to the NAICS codes listed above, the criteria for focused healthcare inspections listed above, and generated using inspection data from the OSHA Information System (OIS) beginning March 1, 2020.

Here's a few interesting notes from OSHA's enforcement memorandum:

- Programmed inspections of healthcare establishments selected from the targeting list under the COVID-19 NEP within the designated three-month period of the initiative are not covered under the initiative and should not be limited in scope as set forth in the memorandum. For follow-up inspections of other healthcare establishments not covered by the memorandum and for any COVID-19 inspection after the designated three-month period, OSHA instructs Area Offices to continue to follow the instructions in the COVID-19 NEP.
- Sites covered by the initiative are to receive an onsite OSHA inspection unless the facility does not treat or handle known COVID-19 patients. If it is determined through records review and employer and employee interviews that a facility does not treat or handle COVID-19 patients, OSHA provides that the inspection should be closed as "records only."
- Facilities that transfer patients or residents exhibiting symptoms of COVID-19 offsite should receive an inspection. OSHA instructs compliance safety and health officers (CSHOs) to assess the employers' procedures for protecting employees while making this determination during initial care of the patient or resident.

### When Does the Enforcement Effort Start and End?

Per the announcement, OSHA intends to expand its presence in targeted high-hazard healthcare facilities during a three-month period from March 9, 2022 to June 9, 2022.

### Where Does the Enforcement Effort Apply?

The enforcement memorandum provides instructions and guidance to **federal** OSHA Area Office. However, at the end of the memorandum, OSHA states that this guidance is also being provided to the OSHA-approved State Plans for informational purposes and consideration. We expect to see some, but not all, of the State Plans adopt a similar approach to supplement the inspections they are already doing under the COVID-19 NEP.

### What Should Employers Expect During an Inspection?

Through this focused enforcement initiative, the agency will verify and assess hospital and skilled nursing care employers' compliance actions taken, including their readiness to address any ongoing or future COVID-19 surges. OSHA laid out these specifics about how the inspections will be conducted in the initiative's memorandum:

1. **Assessment of COVID-19 Mitigation Strategies:** All COVID-19 focused healthcare inspections should follow inspection procedures in the Field Operations Manual (FOM) (including the presence of employee representatives, e.g., union officials, during all aspects of the inspection), but shall be limited to the following assessments:
  - Determine whether previously cited COVID-19-related **violations have been corrected or are still in the process of being corrected**. For follow-up inspections of closed UPA and RRI, determine whether COVID-19-related complaint or referral items have been corrected. Review violation worksheets or UPA complaint or referral items and any employer-provided abatement-certification.
  - Determine whether the employer has implemented a **COVID-19 plan** that includes preparedness, response, and control measures for the SARS-CoV-2 virus. If this plan is a part of another emergency preparedness plan, the review should not be expanded to the entire emergency preparedness plan (i.e., a limited review addressing issues only related to exposure to SARS-CoV-2 would be adequate).
  - Verify the **existence and effectiveness of all control measures, including procedures for determining vaccination status** by reviewing relevant records. Verification of vaccination protocols may be an indicator of a facility's overall COVID-19 mitigation strategies. **OSHA will refer any vaccination-related deficiencies to the Centers for Medicare and Medicaid Services (CMS)**.
  - Request and evaluate the establishment's **COVID-19 log and the Injury and Illness Logs** (OSHA 300 Log, OSHA 300A Summary, and any applicable OSHA 301 Incident Reports) for calendar years 2020, 2021, and 2022, if available, to identify work-related cases of COVID-19.
  - Review the facility's procedures for conducting **hazard assessments** and **protocols for personal protective equipment (PPE) use**.
  - Conduct a limited records review of the employer's **respiratory protection program**. The records reviewed may be limited to the **written respiratory protection program and fit tests, medical evaluations, and training** records for the interviewed employees.





Setting aside questions regarding OSHA's legal authority to engage in such enforcement of COVID-19 issues in the workplace, particularly in light of the rationale outlined in [the Supreme Court's decision in \*National Federation of Independent Business v. Department of Labor\*](#), we think the most important and immediate focus of healthcare organization's should be to review the status of your facilities' COVID-19 programs. While the CDC and other federal and state authorities have loosened considerably the masking, distancing, and other COVID-19 mitigation recommendations for the general public and *non-healthcare workplaces*, this is not the case for the healthcare industry. Thus, hospitals, long-term care facilities, nursing homes, etc. should still have [the major components of OSHA's COVID-19 healthcare ETS](#) in place. Specifically, this includes:

- Hazard Assessments and COVID-19 Plan
- Face Masks, Respiratory Protection and Other PPE
- Cleaning and Disinfecting
- Physical Distancing
- Physical Barriers
- Vaccination, and Patient Screening & Management
- Ventilation
- Training
- Health Screening, Notifications, and Medical Management
- Enhanced Recordkeeping and Reporting

**Pre-Inspection Engagement with OSHA:**

**Very interestingly**, along with the announcement about this enforcement blitz, OSHA also has opened the door to and expressly solicited communication with any healthcare employers who have been continuing to implement and enforce the major elements of the healthcare ETS, even since OSHA shelved the ETS in December. Specifically, OSHA states in its announcement:

***“Healthcare facilities across the country have been applying key components of the Healthcare Emergency Temporary Standard successfully to protect the health and safety of their employees. OSHA would like to learn more about these successful programs. If you would like to share your success stories, please send an email to [Healthcaresafety@dol.gov](mailto:Healthcaresafety@dol.gov).”***  
**While we do not believe the agency will *officially* exempt from this enforcement effort those employers who engage in this interaction with OSHA, for all practical purposes, that could be the result.**

While we do not believe the agency will *officially* exempt from this enforcement effort those employers who engage in this interaction with OSHA in the coming days, for all practical purposes, that may be the result.

We believe it is in your great interest to be recognized by OSHA to be in the category of companies who continue to require the major components of the Healthcare ETS to be in place. We already have engaged with OSHA officials regarding this option and have a fairly high level of confidence that OSHA is not expecting every aspect of the ETS to be in place, just the main components.

**Let us know** if you would like to jump on a call ASAP to discuss the current state of your COVID-19 protocols and other steps to take to prepare for a visit from OSHA.